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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/683,896	10/10/2003	Gary M. Bell	6035.92US01	3094
7590	05/18/2006		EXAMINER	
Merchant & Gould P.C. P.O. Box 2903 Minneapolis, MN 55402-0903			MAHAFKEY, KELLY J	
		ART UNIT	PAPER NUMBER	
		1761		

DATE MAILED: 05/18/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No.	Applicant(s)
	10/683,896	BELL, GARY M.
	Examiner Kelly Mahafkey	Art Unit 1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on \_\_\_\_.
- 2a) This action is **FINAL**.                    2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above claim(s) 12-20 is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_ is/are allowed.
- 6) Claim(s) 1-11 is/are rejected.
- 7) Claim(s) \_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) All    b) Some \* c) None of:
  1. Certified copies of the priority documents have been received.
  2. Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)	4) <input type="checkbox"/> Interview Summary (PTO-413)
2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)	Paper No(s)/Mail Date: ____.
3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date <u>9/19/05, 3/7/05, 15/04</u>	5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)
	6) <input type="checkbox"/> Other: ____.

**DETAILED ACTION**

***Election/Restrictions***

Restriction to one of the following inventions is required under 35 U.S.C. 121:

- I. Claims 1-11, drawn to flexible pouch, classified in class 426, subclass 122.
- II. Claims 12-20, drawn to a method of using the pouch, classified in class 426, subclass 112.

The inventions are independent or distinct, each from the other because:

Inventions I and II are related as product and process of use. The inventions can be shown to be distinct if either or both of the following can be shown: (1) the process for using the product as claimed can be practiced with another materially different product or (2) the product as claimed can be used in a materially different process of using that product. See MPEP § 806.05(h). In the instant case the product as claimed can be used in a materially different process of using that product; the product does not have to be opened along the score line (i.e. the pouch can be opened with scissors anywhere) and the food in the product does not have to be interiorly accessed (i.e. the food item can be dumped out of the package).

Because these inventions are independent or distinct for the reasons given above and the inventions require a different field of search (see MPEP § 808.02), restriction for examination purposes as indicated is proper.

During a telephone conversation with Julie Daulton on May 11, 2006 a provisional election was made with traverse to prosecute the invention of Group I,

claims 1-11. Affirmation of this election must be made by applicant in replying to this Office action. Claims 12-20 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 11 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The term "wave-shaped" in claim 11 is a relative term which renders the claim indefinite. The term "wave-shaped" is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. It is unclear to as what characteristics are included in the limitations of a "wave-shape".

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 3, 4, and 7 are rejected under 35 U.S.C. 102(b) as being anticipated by Galomb (US 6245367 B1).

Galomb discloses of a flexible pouch arrangement comprising:

- (a) a pouch surrounding wall defining an interior volume, a bottom end, and a top end, wherein said surrounding wall comprising first and second opposing panel sections (Items 22 and 24) joined by first and second side seals (Items 30 and 32);
- (b) a gusset closing the bottom end of the pouch surrounding wall and;
- (c) a score line in said pouch surrounding wall; said score line being spaced from said gusset and from said top end to result in a removable pouch section;
  - (i) said removable pouch section comprising portions of said pouch surrounding wall between said score line and said top end;
  - (ii) said score line (Item 44) being spaced from said top end so that a length of said removable pouch section is at least 25% of a height of a remaining portion of the pouch surrounding wall; and
  - (iii) said gusset having an outermost width of at least 30% of the height of the remaining portion of the pouch surrounding wall.

Galomb teaches that the score line is spaced from said top end so that a dimension of said removable pouch section is greater than or equal to an outermost width of the gusset. Galomb teaches that the pouch contains a food product in the interior volume. Refer specifically to Figures 5 and 8. Refer also to Column 2 lines 64-67, Column 4

lines 15-22, 52-65, Column 7 lines 63-67, Column 5 lines 19-37, and Figures 1-10.

Note: In Figures 5 and 8, Galomb teaches said removable pouch section (the top section) is at least 25% of a height of a remaining portion of the pouch surrounding wall (the bowl) and said gusset having an outermost width of at least 30% of the height of the remaining portion (the bowl) of the pouch surrounding wall.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claim 2 is rejected under 35 U.S.C. 103(a) as being unpatentable over Galomb taken as cited above with respect to claims 1, 3, 4, and 7, in view of Olivieri et al. (WO 98/29312).

Galomb discloses of a flexible pouch arrangement as discussed above. Galomb, however, is silent in teaching first and second tear notches in said pouch surrounding

wall and aligned with the score line as recited in claim 2. Olivieri et al. (Olivieri) discloses of a flexible pouch arrangement, such as the one disclosed by Galomb with a pouch comprising:

- (a) surrounding wall defining an interior volume, a bottom end, and a top end, wherein said surrounding wall comprising first and second opposing panel sections joined by first and second side seals
- (b) a gusset closing the bottom end of the pouch surrounding wall and;
- (c) a score line in said pouch surrounding wall; said score line being spaced from said gusset and from said top end to result in a removable pouch section.

Olivieri discloses of improving the pouch by the addition of an opening or tear notch to assist in tearing open the pack. Olivieri discloses that the tear notch in said pouch surrounding wall is aligned with said score line (Figure 9a). Refer specifically to Page 13-15 and Figures 8a, 8b, 9a, and 9b.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to include a tear notch aligned with the score line as taught by Olivieri, in order to facilitate the opening of the pouch. Because both references teach of almost identical pouches, and because Olivieri teaches of a method of improving the pouch one would have a reasonable expectation of success from the combination.

Claims 5 and 6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Galomb taken as cited above with respect to claims 1, 3, 4, and 7 in view of La Pierre et al. (US 5121997).

Galomb discloses of a flexible pouch arrangement as discussed above. Galomb, however, is silent in teaching a first and second gripping tab spaced between said gusset and score line as recited in claim 5, wherein said gripping tab comprises a portion of the said side seal and inwardly extends, defining a cross sectional area of at least 100mm<sup>2</sup> as recited in claim 6.

La Pierre et al. (La Pierre) discloses of a flexible pouch arrangement that contains grip tabs and is thus easy to open. La Pierre teaches that additional gripping means can be added to any particular spot on the bag, including along the tear line to assist in dispensing the bag contents or handling the bag. Refer specifically to the Abstract and Column 5 lines 1-17. It would have been obvious to one of ordinary skill in the art at the time the invention was made to include gripping means on and around (below and above) the tear line as taught by La Pierre. One would have been motivated to do so in order to gain the benefits of such gripping means, including assistance in dispensing bag contents and assistance in handling the bag. Because Galomb deals with an openable pouch and because La Pierre teaches of methods of improving openable pouches, one would have a reasonable expectation of success from the combination. It would have been further obvious to one of ordinary skill in the art at the time the invention was made to include the gripping means comprising a portion of said side seals so that they could be easily gripped (i.e. it is easier to grip the side of the

package rather than the front or back of a package). It would have been further obvious to one of ordinary skill in the art at the time the invention was made to have made the gripping tab an inwardly extending projection with a cross sectional area of at least 100mm<sup>2</sup> in order to allow an individual to grip the pouch or bag.

Claims 8-12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Galomb in view of the combination of Olivieri and La Pierre.

Claim 8 (steps a, b, c, d, and e) recite similar limitations to claim 1 and are rejected by Galomb for the same reasons as claim 1, as discussed above.

Claim 8 (steps f and g) recite similar limitations to claim 2 and are rejected by Galomb in view of Olivieri for the same reasons as claim 2, as discussed above.

Claims 8 (steps h and i) and claim 10 recite similar limitations to claims 5 and 6 and are rejected by Galomb in view of La Pierre for the same reasons as claims 5 and 6, as discussed above.

The only additional limitations between the limitations rejected above (claims 1-7) and the current rejected limitations (claims 8-11) are the tear notch extending into a portion of the gripping tab as recited in claim 9 and the gripping tab as wave-shaped as recited in claim 11.

Regarding claim 9, the tear notch extending into a portion of the gripping tab, given the stated advantages, of a gripping tab at the score line as stated by Pierre and a tear notch at the score line as stated by Olivieri, it would have been obvious to incorporate both the tear notch and the gripping tab into the pouch of Galomb. Olivieri

teaches including a tear notch at the score line as discussed above and La Pierre teaches of the addition of a gripping tab around the tear line as discussed above, thus the tear notch as taught by Olivieri would extend into a portion of the gripping tab as taught by La Pierre, on the pouch or bag as taught by Galomb.

Regarding claim 11 and the shape of the gripping tab, it would have been obvious to one of ordinary skill in the art at the time the invention was made to include the gripping tab in a particular shape, such as in a circular arc in order to allow an individual to grip the pouch or bag with their fingers.

### ***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure

US 4936456 A discloses of tear notches on a pouch in order to assist with opening.

US 6316036 B1 discloses of gripping along notches in order to open a pouch.

US 5375930 discloses of an easily openable pouch with gripping tabs.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Mahafkey whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

 5/15/12

Kelly Mahafkey  
Examiner  
Art Unit 1761



KEITH HENDRICKS  
PRIMARY EXAMINER